IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 7TH NOVEMBER 2006 / 16TH KARTHIKA 1928

CRL.A.No. 243 of 2002()

ST.116/1999 of CHIEF JUDICIAL MAGISTRATE, ALAPPUZHA

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APPELLANT: COMPLAINANT

J.X.LAWRANCE,S/O.C.X.LAWRENCE,
KATTUNKAL HOUSE, VAZHICHERY WARD,ALAPPUZHA.

BY ADV. SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENTS: ACCUSED AND STATE

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1. GRACE ALOYSIUS,W/O.ALOYSIUS,PANACHIKKAL,
P.H.WARD,ALAPPUZHA.

2. STATE OF KERALA, REPRESENTED BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA,ERNAKULAM.

BY ADV. SRI.LIJI.J.VADAKEDOM
PUBLIC PROSECUTOR SRI.C.M.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.HEMA, J.

CRL.A.NO. 243 of 2002

Dated this the 7th day of November, 2006

JUDGMENT

This appeal arises from an order of acquittal of the first respondent. The appellant filed a complaint alleging offence under Section 138 of the Negotiable Instruments Act ('the Act', for short) against the first respondent.

2. As per the allegations in the complaint, the accused approached the complainant at his house and requested to advance Rs.3,00,000/- for business purpose. The amount was paid by the appellant to her in two instalments of Rs.1,02,000/- on 22.4.1997 and Rs.1,23,000/- on 7.6.1997 (the total being Rs.2,25,000/-). It was promised that she will repay the amount within six months from 7.6.1997. But the amount was not paid and on repeated demands, on 7.3.1999 the accused went to the complainant's house and signed a cheque, Exhibit P1 for an amount of Rs.2,25,000/- in favour of the complainant. The cheque on presentation was returned unpaid, as per memo, Exhibit P2. Hence notice, Exhibit P3 was sent to the accused and the accused received the notice as evidenced by Exhibits P4 and P5 postal documents. She sent a reply notice, Exhibit P6. Since the amount was not paid, a complaint was filed after complying with the formalities under the Act.

3. To prove the prosecution case, PW1 was examined and Exhibits P1 to P6 were marked. On the side of the accused, DW1 was examined and Exhibits D1 to D31 were marked. The accused set up a case that her husband borrowed Rs.90,000/- on 24.4.1997 and Rs.1,80,000/- on 7.6.1997 from the appellant and as a security for repayment of the amount, two blank signed cheques of the accused

were handed over to the complainant. On several occasions, amounts to the tune of Rs.6,000/-, Rs.8,000/- etc. were paid by cash and by cheques. On 2.8.1997, Rs.1,00,000/- and on 19.12.1997, Rs.80,000/- were paid back to the complainant. The balance is only Rs.90,000/-. Since the business was on loss, the complainant husband absconded and the complainant started making demands to pay interest and the balance amount, but she could not pay back and hence one of the blank cheques, which was given on 19.12.1997, was filled up by the complainant and was presented before the Bank. The accused does not even know the complainant. He has not given any cheque in 1999, but the cheque, Exhibit P1 is the one taken out from the cheque book used in 1997.

4. On an analysis of the evidence on record, the court found the defence evidence to be believable and acceptable. It was found that certain amounts were paid back and she could prove that the real transaction was the one stated by the accused and not as alleged in the complaint. The lower court also found that Exhibit P1 blank cheque was filled up and that the accused established that a signed blank cheque issued by her in 1997 was misused in 1999, at the instance of the complainant who showed an inflated amount therein. Hence no offence under Section 138 of the Act was made out. These findings are under challenge.

5. In the light of the rival contentions raised in this case and in view of the provision contained in Section 138 of the Act, the most crucial aspect to be considered is whether the cheque, Exhibit P1 involved in this case was “drawn” by the accused, as alleged in the complaint. It is needless to say that the fact that the cheque is drawn by the accused is a fact which is to be proved by the complainant by producing cogent evidence and materials. The case of the

complainant as per the complaint is that on 7.3.1999 the accused went to the house of the complainant and “signed and issued” a cheque, Exhibit P1. In evidence, PW1 deposed that the accused went to her house and “gave” a cheque to the complainant. It is clear from the allegation in the complaint when read with the evidence of PW1 that the complainant's case is that the accused “gave” a signed cheque from the house of the complainant. The complainant has no case that the cheque was written by the accused. In fact, in the cross-examination he stated that the cheque was written by a person who accompanied the accused and he can identify the said person only by sight. Therefore, it is clear that as per the case of the complainant, he had seen the cheque being written by another person and signed by the accused. His case appears to be that Exhibit P1 was the cheque drawn by the accused, which was signed by the accused and caused to be filled up at the instance of the accused by another person, who accompanied her to the house of the complainant.

6. The accused denied all these allegations. According to the accused, the cheque was not drawn by the accused at all. It was a blank signed cheque, which was handed over by the accused to the complainant, when her husband borrowed some amount in the year 1997. Her case is that the cheque leaf was taken out from a cheque book which was used by her in the year 1997. The accused put forward a case that the cheque leaf which was drawn out from a cheque book used in 1997 and handed over to the accused in connection with the transaction in 1997 in the blank, signed form was misused by him, much later, in 1997, i.e., after about two years of the actual transaction.

7. Having denied the hand writing in the cheque and having put forward a case that it was a blank cheque handed over to the

complainant, the complainant ought to have adduced evidence to prove that the cheque was drawn by the complainant herself. It is needless to say that it is not necessary that the hand writing in the cheque must be that of the accused herself. It is enough if the cheque is filled up, under her instructions and she signs the same for the discharge of a debt or liability. But in a case where the accused puts forward a defence that it was a cheque handed over in the blank form, the burden is on the complainant to prove that the cheque leaf was drawn as alleged by the complainant.

8. To prove the drawing of the cheque, there is only the highly interested evidence of PW1. The mere production of the cheque by the complainant from his custody alone will not prove the "drawing" of the cheque. The complainant has to adduce evidence, atleast by examining the person who has written the cheque, allegedly under the instruction of the complainant, to prove that the cheque was "drawn" in the circumstances, stated by the complainant. This is all the more so, since the accused brought in ample evidence to show that the cheque would have been handed over in the year 1997 itself, in a blank form. It was brought out in the evidence of PW1 that there were several payments made, as per several cheques in favour of the complainant. Between 11.7.1997 and 10.2.1997, admittedly, repayments were made, as per cheques on 30 occasions. When a question was put in this line to the complainant, he could not deny the same. He only evaded the question by saying that he did not remember the date, figure etc. But he admitted that on several occasions, payments were made by way of cheques and that such cheques were sent from the accused establishment, i.e., Sword Garments.

9. It was admitted by the complainant that the cheques used to

be sent to him through same person to other and he can identify such persons. He has also admitted that Rs.1,00,000/- was repaid by way of a cheque on 2.8.1997 and Rs.80,000/- was paid by way of cheque on 19.12.1997 and those cheques were encashed by him. It is clear from the admissions made by PW1 himself that that amounts were being given to the complainant by way of cheques, and those were usually being sent through some other person. In such circumstances, it is highly improbable that for handing over just one cheque involved in this case alone, the accused herself will go to the house of the complainant. The accused has a definite case that she is not even aware of the locality of the complainant's house and she had never gone to his house. Therefore, the very case set up by the complainant that for the purpose of handing over the cheque involved in this case alone, the accused had gone to the house of the accused itself is doubtful.

10. That apart, it was proved in this case that about 28 cheques (Exhibits D3 to D31) were issued by the accused and all these cheques are in the handwriting of the accused herself. Twenty seven cheques are seen issued in favour of the complainant himself. All these cheques were written in the hand writing of the accused. These transactions were in the year 1997. The trial court has found out that all the cheques were issued from the cheque book which was used in the year 1997, considering the date, number of the cheque etc. The cheque, Exhibit P1, produced in this case also appears to be the one taken out from a cheque book which was used in 1997, on a perusal of the date, number of the cheque etc. as revealed from the comparison with Exhibits D3 to D31. It is highly improper therefore, that for the purpose of drawing Exhibit P1, the complainant had gone to the house of the accused and signed the cheque and made another person to

write the contents of Exhibit P1 in the complainant's presence. It is highly unlikely that the accused, who has issued all other cheques by herself in her own hand writing and sent over the same to the complainant through another, had gone to the house of the accused only for the purpose of drawing a cheque, Exhibit P1.

11. In the light of the evidence adduced in this case, the case set up by the complainant appears to be highly improbable. The solitary, uncorroborated piece of evidence given by PW1 as against the overwhelming evidence adduced by the accused is totally insufficient to prove the case set up by the complainant. As held by the trial court, Exhibit P1 has been proved to be a blank signed cheque handed over by the complainant in the year 1997, which alone appears to be probable and acceptable. The complainant has miserably failed to prove that the cheque is “drawn” by the accused as alleged by the complainant. In the light of this finding itself, the complainant's case must fail. The order of acquittal is only legal and proper. No interference is called for.

The appeal is dismissed.

K.HEMA, JUDGE

vgs.